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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. 783

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * *

CITY OF HAMMOND, INDIANA, a Municipal Corporation, and [redacted],
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE, and HERSCHEL B. DAVIS,
Respondents.

} In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinions Of The Court Of Appeals And The District Court Are Appended.)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinions Of The Court Of Appeals And The District Court Are Appended.)

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

On January 13, 1941, a creditors' petition under Chapter X of the Bankruptcy Act (the Chandler Act) was filed for and on behalf of Clarence A. Wefel and Orville R. Maxfield, co-partners, d/b/a Wefel and Maxfield, Dela-

van D. Bowsher and Augustus M. Neumann. The petitioners alleged that they were the holders and owners of a substantial number of defaulted City of Hammond Special Improvement Bonds and Coupons issued under the Barrett Law. It is alleged further that:

> "12. Forty-five (45) proceedings to foreclose and enforce the lien of various special assessments against the great portion of the property of the debtor are now pending, as set forth in said Schedule 'D' hereto attached, made a part hereof, and verified by the oath of your petitioners."

An order was entered on January 21, 1941, approving the petition as properly filed under Chapter X of the Bankruptcy Act and appointing Charles L. Surprise as Trustee. Surprise was ordered to file a statement of the assets and liabilities of the Woodmar Realty Company and to propose a plan of reorganization. An order was entered on January 24, 1941, classifying "claims of holders of special assessment bonds of the City of Hammond, Indiana, issued under and pursuant to the Barrett Law of the State of Indiana, as Class 2 claims".

On March 20, 1941, Charles L. Surprise, Trustee, filed his report concerning the financial condition of the debtor. The Woodmar Realty Company had notes available in the amount of $50,161,41, moneys due on land sales contracts in the amount of $44,501.54, and improved real estate appraised at $2,341,970.00.

An Amended Plan of Reorganization of the Woodmar Realty Company was filed and approved on July 3, 1941, requisite consents were obtained by October 23, 1941, and an order entered by the District Court on November 22, 1941, confirming the plan of reorganization as amended.

In the next ten (10) succeeding years, the Woodmar Realty Company's real estate was liquidated for total receipts of $708,982.14. Fees, commissions and expenses paid totaled $216,993.58.

Following prolonged hearings, and by order entered on December 3, 1952, the "proposed amendments to the amended plan and the method of distribution therein suggested" were determined to be not feasible, fiduciary fee claims totaling $287,380.41 denied with minor exceptions, and the Trustee, Charles L. Surprise, removed.

On February 16, 1953, the Court entered an order that the debtor should be adjudged bankrupt and that bankruptcy of the Debtor should be proceeded with in accordance with Section 236 (2) of the Acts of Congress relating to bankruptcy.

Notwithstanding the decision of the District Court entered on December 3, 1952, the successor trustee, respondent Walter A. McLean, represented by Herschel B. Davis respondent, the attorney for the former trustee, Charles L. Surprise, undertook to project a novel and unprecedented method of distributing the trust assets to the alleged holders of City of Hammond Special Improvement Bonds and Coupons. The next ensuing thirteen (13) years were devoted to this new method of procedure. On September 7, 1955, respondent trustee Walter A. McLean reported that an auditor, McCall, had audited the City of Hammond's records and had worked out a formula for distributing the cash assets of the estate.

The "audit" had been performed in the City Hall without the knowledge, consent, or authorization of the financial officers of the City of Hammond.

Twelve (12) years have elapsed since the distribution scheme was filed. The proceedings in the District Court, after September 7, 1955, have been devoted to a series of legal maneuvers designed to eliminate opposition to the distribution scheme. It, "Trustee's Final Report," was finally noticed for hearing, in amended and supplemental form, on October 22, 1965. At this hearing, no evidence was permitted either in support of, or in opposition to, the distribution scheme.

Thereafter, the District Court, on February 10, 1966, denied the objections filed by the City of Hammond to the Trustee's Supplemental Final Report, objections to the petition of Walter A. McLean, as Trustee, for an allowance of fees and expenses, and objections to the petition of Herschel B. Davis, attorney for the Trustee, for fees and expenses. By the same order, the District Court approved the Trustee's Supplemental Final Report and allowed Trustee, Walter A. McLean, the sum of $5,205.75 as fees and $729.96 reimbursement for expenses incurred, and Herschel B. Davis, Trustee's attorney, the sum of $120,000.00 as fees and $3,300.96 reimbursement for alleged expenses paid. The Trustee was ordered to proceed to make "allocations" to special assessment bonds and coupons listed and described in Exhibits "A", "B" and "C" attached to the Trustee's Supplemental Final Report. (Appellants' Appendix in Nos. 15694 & 15695, pp. 6-13, incl.) The City of Hammond prosecuted its appeal to the Court of Appeals for the Seventh Circuit which affirmed on June 22, 1967.

OPINIONS BELOW.

The Court of Appeals rendered a cursory opinion set out as Appendix "A", page 1a, infra. (We have been unable to find evidence that it has been published, either officially or unofficially.)

The order of the District Court appealed from is appended as Appendix "B", page 9a, infra, and the District Court's opinion is appended as Appendix "C", page 15a, infra.

GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS INVOKED.

The judgment sought to be reviewed is dated June 22, 1967, and was entered on the same day. Within 90 days therefrom, and upon petition filed under Rule 22, the time for filing the Petition for Certiorari was extended.

The order of this Honorable Court extending the time for filing the Petition for Certiorari was entered on September 22, 1967, and the time was extended through and including November 4, 1967.

This Court's general jurisdiction to review judgments of the Courts of Appeals in reorganization and bankruptcy cases is involved.

Specifically, the Court's jurisdiction is based upon 11 U.S.C. (Bankruptcy), § 47 (C), and 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether or not the Court of Appeals erred in approving the trustee's supplemental final report and in failing to require the lien claimants to prove their claims by the presentation of evidence at a proper hearing.

(2) Whether or not the Court of Appeals erred in failing to follow the requirements of Rule 52 of the Federal Rules of Civil Procedure.

(3) Whether or not the Court of Appeals erred in denying the City of Hammond's objections to the trustee's supplemental final report, etc., in approving the same, and in ordering payment of recommended "allocations" in favor of some 300 lien claimants, without pleading or proof.

(4) Whether or not the Court of Appeals erred in approving the trustee's supplemental final report as well as the trustee's fee petition and the trustee's counsel's fee petition at the hearing on October 22, 1965, since the City of Hammond, a creditor, did not receive notice of the hearing as required by law.

(5) Whether or not the Court of Appeals erred in approving the fee petitions of the trustee and his counsel where the fee petitions failed to specify, in the detail required by law, the work allegedly performed by said fiduciaries.

(6) Whether or not the Court of Appeals erred in granting the fee petitions of the trustee and his counsel, where under the undisputed evidence in the record, many of the activities for which fees are sought were performed not for the benefit of the estate but for special interests adverse to the estate.

APPLICABLE STATUTES AND COURT RULES.

Rule 52 (a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "Rule 52. Findings by the Court
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948." (28 U.S.C.A., Rule 52 (a), p. 14)

Burns' Indiana Statutes Annotated, § 2-620, provides as follows:

> "No action shall be brought for the foreclosure of the lien of any assessment for streets, sewers, sidewalks, ditches and other public improvements, which is not commenced within five (5) years from the time the right of action accrues: provided, however, that

where any such assessment shall be payable in installments, such action may be brought at any time within fifteen (15) years from the date of the final approval of such assessment as shown by the record creating and evidencing such lien."

Burns' Indiana Statutes, 1963 Replacement, Vol. 9, Part 1, § 48-2721, at p. 346, provides as follows:

"If the property shall sell for more than enough to pay the principal, interest, attorney's fees, costs and expenses, the surplus shall be paid to the property owner or party lawfully and rightfully entitled thereto."

Section 66 of the Bankruptcy Act, 11 U.S.C.A., § 106, provides in pertinent part as follows:

"§ 106. Unclaimed moneys

a. Dividends or other moneys which remain unclaimed for sixty days after the final dividend has been declared and distributed shall be paid by the trustee into the court of bankruptcy; and at the same time the trustee shall file with the clerk a list of the names and post-office addresses, as far as known, of the persons entitled thereto, showing the respective amounts payable to them.

b. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided,* That, in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends. July 1, 1898, c. 541, § 66, 30 Stat. 564; June 22, 1938, c. 575, § 1, 52 Stat. 875."

CONCISE STATEMENT OF THE CASE.

A.

LITIGATION AFFECTING THE CITY OF HAMMOND ON BARRETT BONDS.

The 300 lien claims which the Trustee was ordered to pay are predicated upon alleged ownership and possession of long defaulted City of Hammond Special Improvement Bonds. These special improvement bonds were issued pursuant to resolutions of the Board of Public Works and Safety in the 1920s under the Barrett Law. (Burns' Indiana Statutes Annotated, § 48-2711 and §48-2721 and § 48-4401 through § 48-4432, incl.) Liens were spread in the 1920s upon the real estate benefited by the special improvements through resolutions of the Board of Public Works and Safety. The improvement bonds and coupons were discounted and widely distributed by the contractors. By 1932, all of the bonds and coupons had gone into default because of the fact that the owners of the improved real estate were unable to pay their assessments due to the depression.

By the end of the 1930s, many of the improvement bonds and coupons had fallen into the hands of speculators. The Record in these proceedings discloses that many of them could be and were purchased for a few cents on the dollar.

By January 13, 1941, forty-nine (49) statutory foreclosure suits had been filed in the Lake Superior Courts, Rooms 1, 2 and 5, and in the Lake Circuit Court, on improvement resolutions affecting the real estate of the Woodmar Realty Company in Hammond. (See Schedule

"D", court proceedings involving properties of the Woodmar Realty Company, creditors' petition filed on January 13, 1941.) **The City of Hammond was a defendant in each case.** The forty-nine (49) foreclosure suits were, of necessity, class actions because of the following pertinent provisions of Burns' Indiana Statutes, § 48-2721:

> "Provided, that the first bondholder who institutes foreclosure suit in any court of competent jurisdiction against such property or any lot or parcel thereof shall be entitled to have the proceeds of said suit applied pro rata to the payment of his own bonds and of bonds held by others."
>
> • • • • •
>
> "No more than one (1) foreclosure suit shall be brought against any one (1) lot or parcel of land, but all lots or parcels of land, the assessments against which are in default, may be joined in one (1) proceeding."

The forty-nine (49) lawsuits against Woodmar and the City of Hammond were controlled by relatively few Hammond attorneys, to-wit: Hugh E. Carroll, (Lake Superior Court, Cause No. 51115); Donald C. Gardner, (31 foreclosures); Floyd R. Murray, (6 foreclosures); Bernard A. Petrie, (Cause Nos. 50885 and 51455); C. Ballard Harrison, (Cause Nos. 52503, 52505 and 52969); Jesse McAtee, (Cause No. 11917); Rae M. Royce, (Cause No. 52883); Milo Bruce, (Lake Circuit Court, Cause No. 27490); and Frederick Lisius, (Cause Nos. 51636, 51688 and 51790.)

Shortly after the reorganization proceedings were instituted, C. Ballard Harrison, Floyd R. Murray, and Frederick G. Lisius, became members of a "Bondholders' Protective Committee". Donald C. Gardner and Rae M. Royce acted as attorneys for the committee. Harrison, Murray,

Lisius, Gardner and Royce sought an allowance of fees out of the Woodmar assets in 1951. They controlled, and represented on a "class" theory, City of Hammond improvement bond and coupon holders under 41 of the 49 resolutions affecting Woodmar real estate.

During the 1940's, while these proceedings were pending, C. Ballard Harrison, Donald C. Gardner, Frederick G. Lisius, Rae M. Royce, Trustee Charles L. Surprise, (himself an attorney), and the Trustee's attorney, Carl A. Huebner, **filed and prosecuted numerous so-called "city liability" cases on the same defaulted City of Hammond special improvement bonds.**

These suits were instituted in an effort to exploit a Supreme Court of Indiana decision in the case of *Read* v. *Besczkiewicz* (1939), 215 Ind. 365; 18 N.E. 2d 789; 19 N.E. 2d 463, wherein it was decided that the county treasurer, acting as ex-officio City Treasurer in Barrett Law assessment collections, was obliged to segregate annual installments collected for the benefit of improvement bonds maturing during the year of collection—a new theory in Barrett Law collection and retirement of improvement bond practices. (See *Gilkison, et al* v. *Darlington* (1952), 123 Ind. App. 28; 106 N.E. 2d 473.)

Lake Assessment Bond Service, formed and owned by Trustee, Charles L. Surprise, Trustee's attorney, Carl A. Huebner, and accountant and lien claimant, Clifford Etling, as a vehicle to solicit defaulted City of Hammond Special Improvement Bonds, instituted a so-called "test case" in the name of Herbert Melville, under contract with Lake Assessment, to establish a legal predicate for "city liability" on the part of the City of Hammond under the theory of *Read* v. *Besczkiewicz,* supra. *City of Ham-*

mond v. *Melville* (1944), 114 Ind. App. 602; 52 N.E. 2d 845. Thereafter, Lake Assessment prosecuted a second "test case" on behalf of a Class 2 lien claimant and contract client, Matthew W. Welsh to establish a ten (10) year limitation on suits against the City of Hammond on defaulted special improvement bonds. *City of Hammond* v. *Welsh* (1946), 224 Ind. 349; 67 N.E. 2d 390.

In order to avoid any problem of adjudication in favor of the City of Hammond, Trustee, Surprise, Trustee's attorney, Huebner, and the members of the Bondholders' Protective Committee wrote into the Amended Plan of Reorganization, approved on July 3, 1941, the following significant provision:

> "(C-1) That nothing herein contained shall affect, in any way, the rights and claims of special assessment bondholders who are creditors within Class 2 with respect to any claims or rights which they may now have against the City of Hammond, Indiana, a municipal corporation, upon their respective bonds and coupons, **it being intended hereby to expressly reserve to said creditors within Class 2 as special assessment bondholders, all rights and claims which they may now have against the City of Hammond, Indiana, a municipal corporation.**" (Our emphasis) (Transcript of Record in No. 11783, p. 30)

After procuring the legal predicates in the "test cases", supra, which were undefended both below and on appeal by the then city attorneys, and in the fall of 1946 and early 1947, Trustee, Charles L. Surprise, Trustee's attorney, Carl A. Huebner, bondholders' attorneys, Royce and Gardner, and committee members, Harrison and Lisius, caused one hundred twenty-four (124) judgments totaling $958,000.00 to be entered against the City of Hammond without evidence, proof, or defense by the

then city attorneys. These judgments were subsequently declared void for fraud on the court and on the City of Hammond in two (2) taxpayers' suits tried in the Porter Circuit Court under Cause Nos. 13754 and 13755. On appeal, the Findings of Fact were affirmed and a reversal entered on certain Conclusions of Law. *Gilkison, et al* v. *Darlington* (1952), 123 Ind. App. 28; 106 N.E. 2d 473.

Twenty-four (24) of the one hundred twenty-four (124) judgments, totaling $102,000.00 out of the $958,000.00, were entered under Cause No. 51815 in the Lake Superior Court, Room No. 5, on defaulted City of Hammond Special Improvement Bonds and Coupons allegedly representative of lien rights against the Woodmar Realty Company's real estate. Many of the same bonds and coupons referred to in the Trustee's Supplemental Final Report for beneficial "allocations" were the same bonds upon which attorneys for the Bondholders' Committee took "city liability" judgments in the late fall of 1946 and early spring of 1947.

Much of the documentary evidence introduced in the trial of the taxpayers' suits in the Porter Circuit Court and substantial excerpts of the testimony of the fiduciaries and "lien claimants" was offered and received in evidence by the District Court during the hearings on the fee petitions and the Alternative Plan of Distribution submitted on April 16, 1951.

The $958,000.00 worth of fraudulent judgments against the City of Hammond were, allegedly, based upon an audit of the City of Hammond's special assessment records by a man named Krueger. The so-called "Krueger audit" was never produced during the lengthy trial of the taxpayers' cases in the Porter Circuit Court. The "Krueger

audit" is similar, if not identical, with the "McCall audit" which is the predicate of Trustee McLean's proposed "allocations" in that it did not take into account any of the collections obtained through settlements or dismissals in the forty-nine (49) foreclosure suits prosecuted against the City of Hammond, the Woodmar Realty Company, and others, as hereinabove mentioned, for the express purpose of retiring special improvement bonds and coupons.

On November 29, 1950, Respondent, Herschel B. Davis, spent a day in Crown Point, along with the then co-attorney for Trustee, Charles L. Surprise, Arnold G. Huebner, discussing with the County Treasurer a proposal to pay all of the cash assets of the Woodmar estate, after the allowance of fiduciaries fees, into the Treasurer's Office in the City of Hammond for distribution. (Herschel B. Davis fee petition filed on March 23, 1951, Bill of Particulars, p. 5.) On March 2, 1951, Respondent, Herschel B. Davis, spent one-half (½) day in studying: "in re plan for complete liquidation of Woodmar and payment of such funds to Lake County Treasurer; further review of Barrett Law bond cases; telephone conference with Arnold Huebner." (Davis petition, supra, p. 6.) On February 21st and 22nd, 1951, following conferences with Respondent, Herschel B. Davis, co-attorney, Arnold G. Huebner, prepared a "tentative form of claim of Treasurer of Hammond, Indiana, for balance of proceeds of trust belonging to special assessment lien holders and bondholders." (Huebner fee petition, p. 74.) The denial by the District Court on December 3, 1952, of the "Alternative Plan of Distribution", filed by Respondent, Herschel B. Davis, did not clear the City of Hammond and its taxpayers from attack.

Notwithstanding his "temporary withdrawal" as Trustee's attorney on May 19, 1950, and his subsequent disbarment on April 29, 1954, Carl A. Huebner continued to practice law in his offices in the Calumet Building along with his brother, Arnold G. Huebner, and his son, Paul B. Huebner.

In December of 1958, the Appellate Court of Indiana issued another opinion in connection with the Porter Circuit Court Barrett Bond litigation, (154 N.E. 2d 402), which was set aside by the Supreme Court of Indiana on transfer on December 7, 1959. *City of Hammond v. Darlington, et al* (1959), (rehearing denied 1961), 241 Ind. 536; 162 N.E. 2d 619, 173 N.E. 2d 662. Interpreting these opinions as grounds for a wholesale reinstatement of the "city liability" cases, certain of the Woodmar lien claimants, or Class 2 claimants, involved as so-called "class plaintiffs" in twenty-four (24) of the forty-nine (49) lien foreclosures, hereinabove referred to, acting by and through the Huebner law offices, undertook to prosecute the ninety-eight (98) "city liability" cases involved in the Porter Circuit Court litigation together with an additional fifty (50) cases which had been pending on the dockets of the Lake Superior Courts since 1941 and in which no "agreed" judgments against the City of Hammond had been procured in 1946 or 1947.

In 1960, the City of Hammond successfully defended itself against all of these cases. Woodmar lien claimant, Richard F. Zilky, (the beneficiary of proposed "allocations"), prosecuted an original action in mandamus against the Lake Superior Court, Room #1, as a so-called "test case". *State, ex rel Zilky* v. *Lake Superior Court* (1961), 242 Ind. 128; 175 N.E. 2d 9. Another Wood-

mar lien claimant, (and contract client of Lake Assessment Bond Service), American Fletcher, etc., as Trustee of the William Bartlett Estate, prosecuted a similar "test case" against the Lake Superior Court, Room #5. *State, ex rel American Fletcher, etc.* v. *Lake Superior Court, Rm. #5* (1961), 242 Ind. 118; 175 N.E. 2d 3. Zilky's Petition for a Writ of Certiorari to the Supreme Court of the United States was denied on December 4, 1961. *Richard Zilky, et al, petitioner,* v. *Lake Superior Court, Room #1, et al* (1961), 368 U.S. 928; 82 S. Ct. 364.

Notwithstanding the decisions in the "test cases", supra, the Huebners undertook to prosecute a further "test case" in the name of Lake Assessment Bond Service client, Frank DeLau. They lost this case both below and on appeal. *DeLau, et al* v. *City of Hammond* (1963), 134 Ind. App. 191; 186 N.E. 2d 900. A further effort to block the winding up of the Porter Circuit Court Barrett Bond litigation against the City resulted in extensive contempt proceedings. *State, ex rel Huebner* v. *Porter Circuit Court, et al* (1962), 243 Ind. 321; 185 N.E. 2d 299 and *State, ex rel Huebner* v. *Burns, Judge* (1962), 243 Ind. 524; 186 N.E. 2d 424.

On March 13, 1962, the firm of Huebner and Huebner filed an omnibus case against the City of Hammond entitled *Registration & Management Corp., et al* v. *City of Hammond,* Lake Superior Court, Room #1, Cause No. 162-46.

The following Woodmar Realty Company Class 2, or "lien claimants", are named as parties plaintiff: Registration & Management Corp., listed by Respondent Walter A. McLean, Trustee, as Claim #29, "Realty Assets Corporation", allocation $7,301.34. (Appellants' Appendix in

No. 15694 & 15695, Trustee's Supplemental Final Report, p. 358); American Fletcher National Bank, etc., listed as Claim #30, American Fletcher National Bank, etc., allocation $2,461.07; Sarah Gilkison Carter and Jane Gilkison Curtis, listed as Claim Nos. 443, allocation $4,091.37, (Appellants' Appendix, supra, p. 364), Claim #506, allocation $2,909.19, (Appellants' Appendix, supra, p. 367), and Claim #36, allocation $605.86, (Appellants' Appendix, supra, p. 369); Richard F. Zilky, listed as the owner of Claim Nos. 365 through 380, incl., for a total allocation of $4,667.74, (Appellants' Appendix, supra, p. 368); Darwin F. Luscher, listed as Claim #62, for an allocation of $1,955.78, (Appellants' Appendix, supra, p. 359; and John G. Phrommer, listed as Claim #432, allocation $538.56, Claim #433, allocation $5,285.35, (Appellants' Appendix, supra, p. 364), and Claim #540, allocation $42.12, (Appellants' Appendix, supra, p. 367). The City of Hammond filed Answer and Cross-Complaint seeking an injunction against the named plaintiffs and the Huebners to enjoin them from the institution and prosecution of further suits on the long outlawed, defaulted City of Hammond Special Improvement Bonds issued in the 1920s. An extensive trial was had. **The cause is awaiting decision.**

The proposed "allocation" project of Respondents, Walter A. McLean and Herschel B. Davis, is fraught with danger to the City of Hammond and its taxpayers.

B.

THE FEE PETITIONS OF APPELLEES WALTER A. MCLEAN AND HERSCHEL B. DAVIS.

(1)

Factual Background.

Woodmar's real estate, valued by Trustee Charles L. Surprise on March 20, 1941, at $2,341,970.00 was liquidated by Trustee Charles L. Surprise for gross receipts of $708,982.14 of which $216,993.58 was allowed and paid as fees, commissions, and expenses prior to April 16, 1951. (Record in 11783, p. 124). Following the fee hearing, additional fees and expenses, including $4000 to Respondent Herschel B. Davis were paid in the amount of $10,990.45. Since Respondent's appointment on May 23, 1953, an additional sum of $29,332.94 has been spent. Since the District Court in 1963, sua sponte, ordered the fund to be deposited in interest bearing accounts, $34,712.51 additional income has been received (including reimbursement for bond premium and reverter fees). By way of recapitulation, the income and disbursements (including fees allowed) are as follows:

Total receipts		$743,694.65
Fees, commissions and expenses prior to McLean's appointment	227,974.03	
McLean's disbursements	29,332.94	
McLean's allowance as per order of Feb. 10, 1966	5,935.71	
Davis' allowance as per order of Feb. 10, 1966	123,300.96	
Total		386,543.64
Net cash assets presently available for parties in interest if allowances stand		$357,151.01

It should be borne in mind that the allowances to Respondents Davis and McLean are interim—they contemplate further "work" in finding out who has the bonds, etc., as the disbursing agents.

Also, the record shows that on April 16, 1951, fee claims totalling $287,380.41 were filed by fiduciaries, including Respondent Herschel B. Davis. (Supp. Rec. in 11783, page 20). Woodmar's objections, following extensive hearings, were sustained in major part and a total of only $11,200 allowed. But certain fiduciaries were ordered to reimburse the estate for previous "interim" allowances in the amount of $6100.00. The net fees paid were $5100.00 of which $4000 went to Davis, who on behalf of the trustee, did not oppose a single fee claim (Rec. in 11783, pps. 194-197).

If the fiduciary fee claims had been allowed as prayed for in 1951 the net assets on hand, at present, would be substantially less than $50,000.00, a small return to the parties in interest for liquidating real estate valued by the Trustee at $2,341,900.

(2)

Nature of the Alleged Work Done for Which Compensation Is Sought from the Trust Estate.

The petition of Respondent Herschel B. Davis, filed on May 13, 1965, (App. 15694 & 15695, pp. 104-304, incl.), characteristically devotes the first eleven (11) pages (App. pp. 104 to 114) to a slanted, inaccurate and incomplete history of the first fourteen (14) years that the proceedings were pending after his entry into the same. By way of window dressing, he describes the process of "checking and investigation of claims", a chore which at

least five (5) fiduciaries, including Carl A. Huebner, Charles L. Surprise and Assistant Secretary of Lake Assessment, Arnold G. Huebner, previously claimed credit for over a nine (9) year period before employment of Respondents. What Mr. Davis does not mention is that the increase of two hundred-two (202) so-called Class 2 claims, which occurred over twelve (12) years after the proceedings were commenced, was the direct result of advice from Respondent Davis to alleged representatives of bondholders to "re-file" previously filed claims. The "auditing study" performed by Leonard McCall at a cost to the estate of $17,474.13, (Rec. in 11783, p. 218), was a duplicate of the Arnold G. Huebner "auditing study" previously done, and was supervised, not by Respondents Davis and McLean, but by former bondholder committeeman, Floyd R. Murray, along with attorney Leeney, who now purports to represent 70 lien claimant beneficiaries of the proposed "allocations".

The next four (4) pages are devoted to a description of the work done in connection with the first two (2) appeals, precipitated by lien claimants' attorneys, and in which Respondents were unsuccessful, (Cause Nos. 11783 and 13023). In 11783, Respondents "volunteered" to assist lien claimants' attorneys Floyd R. Murray, Edmond J. Leeney, Albert H. Gavit and Charles Levin obtain an adjudication that "Woodmar was not a party in interest" so as to eliminate opposition to the auditing study program of "allocation" and fiduciary fee petitions, the insurmountable hurdle which they had encountered on April 16, 1951.

With regard to the efforts to settle with 102 lien claimants and 3 of the 4 general creditors, despite full notice

and hearing, no objections were made by anyone, including respondents, in the District Court. The settlement stipulations would have disposed of 105 claims to the satisfaction, of record at least, of all parties to the proceedings. The settlement stipulations provided, in pertinent part:

"STIPULATION OF DISMISSAL

Comes now Ruth E. Robertson by Magnus F. Heubi, her attorney, and the Woodmar Realty Company by Owen W. Crumpacker and George V. Burbach, its attorneys and stipulate and agree as follows:

1. That Claim No. 430 has been amicably settled, compromised and adjusted. That the objections of the Woodmar Realty Company to Claim No. 430 be and hereby are withdrawn and that Claim No. 430 should be dismissed with prejudice.

2. That simultaneously with the execution of this stipulation, the claimant will execute an assignment of Bond No. 15, in each of Series 8 and 9; Hammond Special Improvement Resolution 1493 with coupons 6 through 15 attached to Bond 15 Series 8 and coupons 6 through 17 attached to Bond 15 Series 9, to the Woodmar Realty Company, subject to Court approval.

3. That upon approval of this stipulation and assignment, the Court shall enter an order directing the Trustee Walter A. McLean to issue a check on the Trustee's account in the Gary National Bank in the amount of $375.00 payable to Ruth E. Robertson, care of Magnus F. Heubi, Attorney at Law, Citizens Trust Building, Jeffersonville, Indiana.

All Of Which is stipulated to by and between the parties this 12 day of October, 1957.

Ruth E. Robertson
By: /s/ Magnus F. Heubi
Her Attorney

Woodmar Realty Company
By: /s/ Owen W. Crumpacker
/s/ George V. Burbach
Its Attorneys
5217 Hohman Avenue,
Hammond, Indiana"

Approved:

.....

Judge, United States
District Court

(Settlement Stipulation of Ruth E. Robertson)

While purporting to be "neutral" in the District Court, respondents fought approval of the 105 settlement stipulations on appeal. They admitted that approval of the settlement stipulations would result in a further surplus of $76,489.89 in the estate but contended, at p. 27 of the Respondents' Brief on Appeal, filed on August 2, 1960:

> "It then follows that the mere fact that the compromise settlements would take $76,489.89 from the lien creditors and place it in the general funds of the bankruptcy, does not of itself determine that it is for the best interests of the estate.
>
> The question then is: Is it for the best interests of the estate? Is it fair and equitable under all the relevant facts disclosed by this record that this sum of $76,489.89 be taken from the lien creditors?"

This Court answered the question "Yes", and reversed the decision of the District Court and directed the District Court to approve the settlement stipulations. (284 F. 2d 815). Some six (6) months later, and on July 21, 1961, the District Court entered an order approving the 102 settlement stipulations with lien claimants and 3 settlement stipulations with general creditors. But, respondents undertook to flout the mandate of the Court of Appeals because it might upset "the auditing study and the

allocation of cash to claims". The petition of Herschel B. Davis, alleges, at the bottom of App. p. 119:

> **"The Trustee and petitioner herein, however, advised the District Court that in their opinion the payment of such compromise settlements at that time would be premature and inadvisable until there had been a court approval of the auditing study and the allocation of cash to claims,** as set out in the Trustee's Final Report, and until it was determined that the Trustee's Final Report was not a fraudulent report, as contended by Woodmar Realty Company and its attorney."

The Davis petition then recites (App., pp. 121-124, incl.) how they successfully remained mute in the District Court and intervened on appeal to prevent eleven (11) further lien claimants, all represented by attorneys, from concluding settlements of their lien claims (without objection) and to keep thirty-three (33) patently abandoned lien claims available for "allocation".

The balance of the Davis petition, (App., pp. 124-139, incl.), is devoted to a description of work done in Claim 441 (tried by attorneys Floyd R. Murray and Edmond J. Leeney on July 15th and 16th, 1957); efforts to prevent being removed, both below and on appeal; activity in presenting the "Motion for Summary Judgment"; and their efforts in frustrating the mandate of the Court of Appeals in obtaining an order, without notice, under date of April 28, 1964, purporting to "vacate approval of the 105 settlement stipulations", supra, on the ground that there wasn't anything the Woodmar Realty Company could do about it because it was not "a party in interest" even though the Court of Appeals had previously held in February of 1957, in Cause No. 11783, that it was obviously a real and substantial party in interest. For these

activities, respondent Davis alleges that he applied "skill derived from 30 to 40 years in the active law practice" and that the reasonable value of his rendered services was $120,000.00.

Respondent Walter A. McLean, Trustee, alleges that he was more than a stakeholder in the proceedings, that he, along with Davis, studied the claims, that he was maligned as the important officer of a title company, that he consulted and advised with attorney Herschel B. Davis and went to court with him on occasion, and that he was entitled to the maximum authorized by law, $5,480.75 plus reimbursement for $729.96 out-of-pocket. (App. in 15694 & 15695, pp. 30-103, incl.)

(3)

The Record Discloses That All of Appellees' Activities, as Described in the Fee Petitions, Were Performed Not for the Benefit of the Estate But for Special Interests, Adverse to the Estate.

Since his employment on May 23, 1950, as co-attorney with Lake Assessment Assistant Secretary, Arnold G. Huebner, for Trustee Charles L. Surprise (President of Lake Assessment Bond Service, Inc.), respondent Herschel B. Davis has undertaken, at the expense of the estate, to work for special interests adverse to the estate who had lawyers of their own. These special interests are confined to the particular Class 2 lien claims which the former fiduciaries either own (Zilky, Gardner, Wefel, etc.) or have a direct financial interest in by contingent fee contract, (Lake Assessment Bond Service, Inc. and 70 Murray-Leeney claims). Respondents Davis and McLean successfully opposed the efforts of the late Hugh E. Carroll, the attorney for the holders of the largest number of City

of Hammond Special Improvement Bonds and Coupons, to obtain a court adjudication of his and his clients' lien rights, if any, in the assets. The respondents, in the second appeal, fought against the desires, intentions and advice of the attorneys who represented 102 lien claims and 3 out of the 4 general creditors of the Woodmar Realty Company. They, likewise, successfully opposed the 11 lien claimants and their counsel who made subsequent efforts to settle. (Rec. in No. 13575)

Respondents joined with attorney Albert H. Gavit (who appeared for Lake Assessment contract clients in this case and represented Carl A. Huebner in the state court proceedings); Charles Levin (who appears of record for claimants Zilky and Gardner); and bondholder committeeman, Floyd R. Murray, and his trial counsel, Edmond J. Leeney (who now purport to represent seventy (70) lien claimants), both below and on appeal, in their unsuccessful efforts to have the Woodmar Realty Company's pleadings stricken on the ground that Woodmar was not "a party in interest". The Davis fee petition discloses numerous periodic conferences with them thereafter, both in person and on the telephone, with reference to the affairs of the estate. (App. in 15694 & 15695, pp. 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 157, 158, 159, 160, 162, 163, 164, 167, 168, 170, 171, 172, 173, 174, 175, 176, 177, 179, 181, 182, 183, 184, 185, 186, 187, 190, 191, 192, 193, 197, 201, 228, 246, 248, 252, 253, 262, 266, 275, 277, 279, 280, 293, 294, 295 and 303.) In no instance do the listings describe what Davis conferred about or in what manner, if any, the conferences were of benefit to the estate. The estate is charged bonus rates for the "conferences". For instance, on November 26, 1962, the

estate is charged for **two (2) days,** Davis one (1) day and Gruenberg one (1) day, for "telephone conference—McLean; telephone conference—Charles Reed; Telephone conference—Floyd Murray; Telephone conference—Charles Levin. (App., pp. 265 & 266).

With reference to Claim 441, **tried by Leeney and Murray,** and in which respondents Davis and McLean had no authority to act, the estate is charged for a total of 35½ days plus 42 hours over a period of time commencing on July 10, 1957, (While Murray and Leeney were in Lafayette, Indiana) through November 21, 1962: "further work on review of record on 441 and court's decision." Yet the correspondence reveals that both Murray and Leeney are handling Claim 441 (and 69 others) on a contingent fee arrangement.

For example, on March 22, 1965, respondent Davis charged the estate for one-half (½) day's work in "two (2) telephone conferences—attorney Floyd Murray re claims", and letters to Sarah Schweitzer and Mary A. Magginis reading in pertinent part as follows:

> "After receiving your letter, I called Mr. Murray on the telephone and questioned him about this representation. He told me that on June 10, 1958, Francena Tyner executed a Power of Attorney authorizing him to represent her on this claim and that he had considerable correspondence from Attorney Baxter to this same effect. **Mr. Murray then read to me a letter which he said was written by you on March 14, 1960, asking that he continue representation on this claim. Attorney E. J. Leeney and Attorney Murray, both of Hammond, Indiana, represent about 70 claimants in this matter. They are excellent attorneys."**

A follow-up letter is written by Mildred Anderson on April 1, 1965, in the Huebner offices, allegedly on behalf of Floyd R. Murray, reading in pertinent part as follows:

> **"I do not know what my attorneys fees will be at this time in this matter. It will be a percentage of the money recovered.** We just received word that the United States Supreme Court had refused the petition of the Woodmar Realty Company, the bankrupt. This means that further progress can now be made.
>
> This claim is in the name of Francena Tyner. No disbursement can be made to her heirs until the names of such heirs have been substituted as claimants in the claim.
>
> **My fees will depend upon the amount of additional work that needs to be done. If you do not intend to sign this power of attorney, kindly advise me at once."**

On October 22, 1965, attorney Edmond J. Leeney, by way of reciprocation and although he admitted he hadn't read the Davis fee petition, recommended to the District Court as follows:

> "Mr. Leeney: Well, Your Honor, I haven't read Mr. Davis' petition, except to know that the number of days, I think, that were put in all together were about 800. I am pretty much familiar with what work he did from time to time, and I know that at one time Mr. Murray and I were carrying the burden here when a previous judge would not permit him to do anything in the case, and that from then on Mr.—when Mr. Davis—as your Honor took over, Mr. Davis was permitted to go ahead and the Trustee, and I know that all during the time it has been Mr. Crumpacker's aim to defeat all these claims.
>
> * * * * *
>
> Now, these are minimum fees fixed by the Hammond Bar Association. So that if Mr. Davis has put in 800 days and his bill is for $120,000.00, I think it is reasonable.

The Court: No one else wants to comment?
(No Response.)" (Transcript of proceedings held on October 22, 1965, pp. 111, 112, 113.)

The same Hammond Bar Schedule authorizes, as a minimum, fifty per cent (50%) of moneys "recovered" on a contingent basis. Therefore, it is reasonable to assume from the correspondence that Leeney and Murray are to receive at least fifty per cent (50%) (the minimum) of the "allocation" figures to at least seventy (70) of the proposed "allocations", not including those on the abandoned or Class "B" list, or the 123 lien claimants that have attempted to settle. Nor are Leeney and Murray to participate in the 15 "Zilky allocations" (Levin), or the lien claims formerly represented by Hugh E. Carroll, or the $87,000 in Lake Assessment bonds and coupons now represented by Gavit of record.

The Record shows further that respondent Davis has undertaken to charge the estate for 33 days and 112 hours in work done on the "Motion for Summary Judgment", commencing with 6 hours on January 7, 1960, and ending with ½ day on July 16, 1964, (App., p. 285), "Study and review of Motion for Summary Judgment and law applicable on review". Yet the "Motion for Summary Judgment" consists of four (4) numbered sentences plus approximately ten (10) pages of "review of the record", and certified copies of instruments previously furnished to respondent Davis by Woodmar's counsel.

ARGUMENT.

I.

THE ADJUDICATION IN FAVOR OF 300 LIEN CLAIMS, BASED UPON ALLEGED OWNERSHIP OF CITY OF HAMMOND SPECIAL IMPROVEMENT BONDS, IN ACCORDANCE WITH THE RECOMMENDATIONS OF THE TRUSTEE IN THE SUPPLEMENTAL FINAL REPORT, ETC., CONSTITUTES SUCH A WIDE VARIATION FROM THE PROCEDURES SET FORTH UNDER THE BANKRUPTCY ACT, JUDICIAL PRECEDENTS AND THE FEDERAL RULES OF CIVIL PROCEDURE AS TO NECESSITATE REVERSAL.

A. The Law Requires Lien Claimants To Prove Their Claims.

The lien claims are not the obligations of the Woodmar Realty Company. Nor are they the general obligations of the City of Hammond. The Special Improvement Bonds and Coupons are creatures of statute and the rights of bondholders and obligations of the City of Hammond and property owners are fixed by statute.

When the owner of a defaulted City of Hammond Special Improvement Bond seeks to recover funds in the hands of a bankruptcy trustee, his claim is not a "provable claim" under Section 57 of the Bankruptcy Act (11 USCA 93), but is a reclamation petition. In the instant case, under the Bankruptcy Act, it was and is the duty of the 300 lien claimants to prove: (a) That they are the owners and holders of defaulted City of Hammond Special Improvement Bonds; (b) That as such owners and holders they have a statutory lien upon the cash assets;

and (c) That the Trustee has identifiable cash, in determined amounts, arising through the liquidation of his lien rights.

The District Court, on July 15, 1957, held in pertinent part, as follows:

> "**So, the burden,** in other words, the claim itself, proof of claim is not sufficient where there have been objections filed. **Ownership will have to be proved in the claimants. You will have to prove, gentlemen, that there was a lien, and that these bondholders are entitled to participate under the lien, and the amount.** It is incumbent upon you to prove that they are entitled to that amount under these bonds. That is on the theory that the claimants are lienholders. Now, whether they are or not, this court is not holding at this time, but you are going to have to prove the lien under the improvement resolutions 1296 and 1399, and the orders that were entered transferring that lien or liens from the real estate to the proceeds derived from the sale thereof. **Those facts you will have to prove.**" (Transcript in No. 13579)

In so doing, the District Court was applying the law established by this Court in the case of *In re Rosenbaum Grain Corp.* (C.C.A. 7, 1940), 112 F. 2d 315, at page 318:

> "* * * Ordinarily, every claimant to the assets in the hands of the trustee of the bankrupt's estate desires priority and for that reason seeks to establish that his property was acquired under circumstances giving rise to a relationship other than that of an unsecured creditor. But another requirement is generally recognized. The non-creditor claimant has the burden of proof and must be able to trace his property into the hands of the trustee in bankruptcy. If his evidence leaves the identification in doubt, the doubt must be resolved in favor of the trustee. *Richardson v. Shaw,* 209 U.S. 365, 28 S. Ct. 512, 52 L. Ed. 834, 14 Ann.

Cases 981; *Gorman* v. *Littlefield,* 229 U.S. 19, 33 S. Ct. 690; 57 L. Ed. 1047; *Schuyler* v. *Littlefield,* 232 U.S. 707, 34 S. Ct. 466, 58 L. Ed. 806; *Duel* v. *Hollins,* 241 U.S. 523, 36 S. Ct. 615, 60 L. Ed. 1143; *In re Byrne,* 2 Cir., 32 F. 2d 189, 190."

It is also the law in all other circuits. Honorable Judge Learned Hand, speaking for the Court of Appeals in the Second Circuit in the case of *In re Byrne* (1929), 32 F. 2d 189, 190 said:

> "The appellants have quite misapprehended their rights and have proceeded throughout on the assumption that they are entitled to the same relief in bankruptcy as they would have against the bankrupt in personam. Their claim is not that, but against the res administered in the Bankruptcy Court. To get any standing, except as general creditors, they must identify the original assets, or trace them into other specific funds which came into the trustee's hands. It is not enough to show that they were converted by the bankrupt, or indeed that they may have generally enriched their estate. (Citation omitted.) The claimant has the burden of identification in such cases, and the appellants at bar have made no effort to discharge it. To the extent that the bankrupt's books acknowledge the identity they can prevail, but no further; the balance of their claim is a general credit against the trustee, and we are not here concerned with this liquidation."

Likewise, in the case of *American Service Co.* v. *Henderson, et al.,* (C.C.A. 4, 1941), 120 F. 2d 525, it is said at page 530:

> "Clearly the burden rests upon the claimant to establish the original trust relationship. He must prove his title, identify the trust fund and, where the fund has been mingled with the general property of the debtor, sufficiently trace the trust property."

(To the same effect, see *In re Tate-Jones & Co., Inc.* (W.D. Pa., 1949) 85 F. Supp. 971.)

When the Trustee's Supplemental Final Report; "Petition for Authority to Make Distribution to Claimants, etc." and the Objections of the City of Hammond (and others) thereto were submitted for trial on October 22, 1965, not a lien claimant appeared, no City of Hammond Special Improvement Bonds and Coupons were offered or received in evidence, no proof was offered establishing the existence of a lien, and no evidence was heard with reference to the amount of cash due any lien claimant. In other words, 300 lien claims were adjudicated against the assets of the estate without proof.

B. An Alleged "Auditing Study" Cannot Be A Substitute For Pleading And Proof As Required By Law.

The "auditing study" concept originated with the former trustee's attorney, Carl A. Huebner:

> "Q. Well, isn't it a fact the first one that ever came before the committee with such a suggestion, as shown by the minutes, was Carl Huebner?
>
> A. I think so. I think everyone agreed that was the best method.
>
> Q. In all of the Barrett Law matters you have had in Hammond, where there was a distribution following liquidation problem, that is, after the fees were paid, it was the Huebner program, the Carl Huebner program, to throw the residue into the Treasurer's office for distribution, wasn't it?
>
> A. Yes.
>
> Q. And that was all right with you, wasn't it, as a representative of bondholders?
>
> A. Yes." (Gardner, Volume 14, pages 2898-2899, —May 25, 1951.)

As previously pointed out in this brief, Arnold G. Huebner, law partner of Carl A. Huebner and co-counsel with respondent Herschel B. Davis for trustee Surprise, had already performed the basic audit, and by May 19, 1950, the alleged rights of the bondholders had already "been calculated and determined by the fiduciaries".

An identical audit, prepared under the direction of Carl A. Huebner, under the same circumstances, was found to be fraudulent in *Gilkison* v. *Darlington* (1952), 123 Ind. App. 28; 106 N.E. 2d 473:

> "The trial court, in its special findings of fact, found, among other things that (1) the attorneys for the judgment-plaintiffs, the attorneys for the City of Hammond, and the controller Keller H. Cochran, had agreed on the procedure to be followed, whereby they attempted to defraud the city of the sum of $958,000.00 by the taking of judgments and the payment thereof through the issuing of bonds upon the city. The court found that as a part of this conspiracy the defendant Cochran (1) participated in the meeting of August, 1946, between Huebner (whose clients held more than half the judgments), Stilley, the City Attorney, and others; **that he directed the preparation of the "Krueger audit," upon which all judgments were based, which audit was found by the court to be grossly excessive and was falsely represented to the court as having been made under the supervision of the State Board of Accounts.** That another step in the fraudulent scheme was (2) the issuance of a misleading prespectus by Cochran's office for the purpose of selling the bonds with which to pay off the several judgments. The court further found (3) that Cochran was informed by attorney Harrison of the fraudulent practices followed by attorneys Huebner and Gardner as to the judgments

taken by them and, when so informed, he told Harrison that his judgments must be made to conform to the same pattern or they would not be allowed."

The Record discloses that the "auditing study", prepared by Leonard McCall under the direction of Floyd R. Murray, was not offered or received in evidence. Nor was the auditor produced. According to the "Trustee's Supplemental Final Report, etc." the auditor undertook to usurp the functions of the District Court in matters of law as well as fact (allocations). Through an alleged examination of records in the City Hall, at undisclosed times, he determined "lien liability". Likewise, through an ex parte, out of court examination of "bond records", the auditor determined what bonds were or were not paid. The "auditing study" would be the hearsay conclusion of a witness, even if it were produced.

C. The Adjudication Declares Liens In Favor Of Outlawed City Of Hammond Special Improvement Bonds Where The Liens Have Lapsed Under The State Law.

Exhibit 97, Record in 13215, sets out the date of the adoption by the Board of Public Works of the City of Hammond of each of the fifty (50) Improvement Resolutions authorizing the issuance of the bonds and coupons involved in the 300 liens adjudicated by the order of February 10, 1966. Twenty-two (22) of the Resolutions were adopted in 1925. Seven (7) were adopted in 1926. Fifteen (15) were adopted in 1927. Six (6) were adopted in 1928. By statute, the liens remained in existence for a period of fifteen (15) years from the date of the adoption of the final Resolutions. Burns' Indiana Statutes Annotated, § 2-620, provides as follows:

"No action shall be brought for the foreclosure of the lien of any assessment for streets, sewers, side-

walks, ditches and other public improvements, which is not commenced within five (5) years from the time the right of action accrues: provided, however, that where any such assessment shall be payable in installments, such action may be brought at any time within fifteen (15) years from the date of the final approval of such assessment as shown by the record creating and evidencing such lien."

Burns' Indiana Statutes Annotated, Section 48-2722 provides in pertinent part as follows:

"Failure to pay any installment or principal or interest where (when) the same is due shall bring all installments of principal yet unpaid forthwith due and payable * * * No action shall be maintained for such foreclosure which is not commenced within five (5) years from the time the right of action accrues * * *"

Because the Barrett Law liens are creatures of statute and not of contract, the statute of limitations not only is a bar to a remedy but completely extinguishes the right and vests perfect title in the land holder. Unlike general statutes of limitations, the limitations on Barrett Law liens are statutes of extinguishment and cannot be waived or extended beyond the statutory period. The lien itself lapses by operation of law at the expiration of the statutory period of time. Such is the established case and statutory law of Indiana. *Marshall County Auditor, et al.* v. *Watkins,* 106 Ind. App. 235, 18 N.E. 2d 954. See also *Burns' Indiana Statutes,* Sec. 2-621. (Requires the county treasurer to cancel the assessment, thereby destroying the lien, by endorsement.)

The bankruptcy court is without power to extend the scope or duration of a lien created by state statute for a limited period of time. In determining the scope of

a statutory lien the bankruptcy court is bound by the law of the state creating the lien and cannot extend its operation beyond beyond that provided by statute. *In re: Hammond Interior Finish Co.*, (CCA 7, 1926) 13 F. 2d 578; *Sims* v. *Jamison*, (CCA 9, 1933) 67 F. 2d 409; *In re: New England Breeders Club*, (DCNH, 1910) 175 F. 501, p. 503; 8 C.J.S. Bankruptcy, §453.

The Record discloses, therefore, that the statutory liens had lapsed, by operation of law, prior to January 13, 1941, with reference to bonds and coupons issued pursuant to twenty-two (22) out of fifty (50) of the Resolutions. The liens had lapsed, as a matter of law, with regard to seven (7) additional Resolutions by December 24, 1941. Any and all remaining lien rights lapsed on and prior to October 15, 1943. The Record discloses, therefore, that, in most instances, the bonds and coupons were "outlawed" at the time the claims were filed. Nevertheless, at the instance and petition of respondents, valid liens were adjudicated in their favor.

D. The Adjudication In Favor Of Appellee Trustee's Petition For Authority To Make Distribution To Claimants On Claims Which Have Been Allowed And On Bonds And Coupons Constituting Lien Liabilities Of The Bankruptcy Estate Violates Prior Court Orders Establising Bar Dates.

The Record discloses that the Trustee has petitioned for the "allocation" of $42,148.84 to unknown holders of improvement bonds and coupons, if any, who have never filed a claim. In addition, he proposes to allocate $14,2 .00 in favor of alleged persons who didn't have bonds and coupons. Further, he has proposed to "allocate" trust assets in favor of approximately ninety (90)

lien claims that were filed more than twelve (12) years after the institution of these proceedings and in violation of bar dates entered by court order in these proceedings.

As previously mentioned, the District Court entered a sixty (60) day bar date in January of 1941, and by order dated November 28, 1941, provided in pertinent part as follows:

> "That the claims of creditors and stockholders who have not filed their claims herein should not be allowed to participate in said plan or hold any claim, interest or equity in the property of the debtor, except on order of this court for cause shown as provided by the provisions of Chapter X of the Bankruptcy Act."

It is stated in *Gardner* v. *State of New Jersey* (1947), 329 U.S. 565, 67 S. Ct. 467, with regard to the power of a federal court, in reorganization, to fix effective bar dates against lien claims even of a higher priority than special assessment liens:

> "(1,2) First. We think, contrary to the position of New Jersey, that the reorganization court had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was not a suit against the State. Section 77 deals not only with claims of private parties but with those of public agencies as well. Section 77, sub. b, defines 'creditors' as 'all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act.' And 'claims' are defined to include 'debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character.'

Id. And § 77, sub. c. (7), provides for the prompt fixing of a reasonable time within which the 'claims of creditors' may be filed and the manner in which they may be filed and allowed. The words 'all holders of claims' have no qualification and are sufficiently broad to include public agencies as well as private parties. The 'claims' of creditors include secured and unsecured claims. We find not the slightest suggestion that Congress left out the large class of tax claims which recurringly appears in reorganizations and often assumes, as here, large proportions. They are expressly included among provable claims in § 57, sub. n, of the Bankruptcy Act. 52 Stat. 840, 867, 11 U.S.C. §93, sub. n, 11 U.S.C.A. § 93, sub. n. 5. And the sweeping, all inclusive definitions of 'claims' and 'creditors' in § 77 leave room for no exception under it."

E. The Trustee's Supplemental Final Report; etc. Ignores The Duty Of The District Court, Under Rule 52 Of The Rules Of Civil Procedure, To Make Findings Of Fact In Favor Of Lien Claimants Before Adjudications Can Be Made In Their Favor.

The District Court, in one of the opinions in connection with lien Claim No. 441, (Appellants' App. in 13579, p. 31), held in pertinent part:

> "Hereinafter this court will hold a hearing to determine what amount, if any, the claimants herein and other Class 2 claimants, whose claims are found to be valid, are entitled to. In the event the court holds that the claimants are entitled to recovery, counsel for said claimants will thereupon file proposed findings of fact and conclusions of law and a proposed order."

No further hearings have been held, no claimants have tendered proposed findings, and none have been entered in connection with any claims (except 441).

The applicability of Rule 52(a) to proceedings under the Bankruptcy Act has been consistently recognized by the federal courts. In the case of *Perry* v. *Baumann, et al.* (C.C.A. 9, 1941), 122 F. 2d 409, the Court states at page 410:

> "Order 37 of the General Orders in Bankruptcy, 11 U.S.C.A. following Section 53, provides: 'In proceedings under the [Bankruptcy] Act the Rules of Civil Procedure for the District Courts of the United States (28 U.S.C.A. following Section 723(c)) shall, insofar as they are not inconsistent with the Act or with these General Orders, be followed as nearly as may be.' Rule 52(a) of the Rules of Civil Procedure provides: 'In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct an entry of an appropriate judgment.' Rule 52(a) is not inconsistent with the Bankruptcy Act or with the General Orders in Bankruptcy. It therefore should have been followed in this case."

This is further recognized in the case of *Dryblough* v. *Ware* (C.C.A. 6, 1940), 111 F. 2d 548, in which the Court held that the Bankruptcy Court must find the facts specially and state separately its conclusions of law:

> "Even where Rule 52(a) of the Federal Rules of Civil Procedure in effect, the court would nevertheless be required to find the facts specially and state separately its conclusions of law. Order 37 of the General Orders in Bankruptcy, effective February 13, 1939, 11 U.S.C.A., following Section 53 * * *"

Rule 52(a) imposes a mandatory duty upon the District Court. As stated by this Court in the case of *Application of Murra*, C.C.A. 7, (1948), 166 F. 2d 605, at page 606:

> "While the question was not raised except during oral argument before this Court, we think it is an appropriate occasion on our own volition to consider

and decide whether a District Court is required to make findings of fact and enter its conclusions of law in a proceeding of the instant character. Fairness to the parties, to the court below as well as this Court suggest the importance of such a ruling. The question requires a determination as to whether Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following Section 723(c) is applicable. This rule provides: 'In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of an appropriate judgment * * *.'

This rule, if applicable, is mandatory. *Bach, et al.* v. *Friden Calculating Mach. Co., et al.*, 6 Cir. 148 F. 2d 407, 409-411. * * *

We are of the view, therefore, that Rule 52 is applicable to a proceeding of the instant character [naturalization proceedings] and that the court below is required to make findings of fact and conclusions of law as the basis for an appropriate judgment."

The mandatory nature of Rule 52 is likewise expressed by this Court in the case of *Dearborn National Casualty Co.* v. *Consumers Petroleum Co.* (C.C.A. 7, 1947), 164 F. 2d 332; at p. 333:

"Counsel for both sides requested the trial judge to enter findings of fact and conclusions of law, but he refused to do so. He did file a 'Memorandum Opinion', in which he found certain facts and drew certain conclusions; but it falls short of the findings of fact and conclusions of law contemplated by the Federal Rules of Civil Procedure, 28 U.S.C.A. True it is that Rule 51(a) provides: '* * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *' But, this provision does not relieve the trial judge of making adequate findings. It only relieves him from doing what some courts have ruled was a requirement, that is, filing findings of fact and con-

clusions of law, separate from opinion. Of course, a judge need only make brief, definite and pertinent findings of fact and conclusions of law. Findings in elaborate detail are as much to be avoided as the long argumentative findings and conclusions often presented by counsel for a successful litigant. However, the findings and conclusions should adequately cover the contested issues."

The Record discloses that no findings of fact and conclusions of law were made in support of the approval of the Supplemental Final Report and Petition and the adjudication in favor of 300 lien claimants, in connection with the judgment of February 10, 1966.

F. The Adjudication Of The "Allocations" Is Illegal On Further Grounds: It "Allocates" Illegal Interest; Pays A Forged Claim; Divides Up Surplus Cash Among Undisclosed City Of Hammond Special Improvement Bondholders; Ignores Cancellation Decrees Protecting The City Of Hammond; Misappropriates Trust Assets In Violation Of The Law Of The Case; And Undertakes To Violate The Bankruptcy Act With Regard To The Disposition Of Surpluses.

(1)

Illegal Interest.

As heretofore pointed out, legitimate lien claimants, even if they proved up their liens and traced the liens into the cash in the hands of the trustee were entitled to interest only up to January 13, 1941. *Sexton* v. *Dreyfus* (1911), 219 U.S. 339, 31 S.Ct. 256; *In re. Chandler* (C.C.A. 7, 1911), 184 F. 887; *Hutchinson* v. *Otis,* (C.C.A. 1, 1902), 115 F. 937; *In re. Morrison* (C.C.A. 7, 1919), 261 F. 355. The Record shows further that in the trial of the case of intervening petitioners, Ruth S. Julius, et al, Claim No.

441, among defenses urged by the Woodmar Realty Company was Objection No. 7, (Appellants' App. in 13579, p. 104), against the allowance of interest beyond January 13, 1941. That the Woodmar Realty Company prevailed in this defense can be ascertained from an examination of the Findings and Conclusion of Law No. 3, (Appellants' App. in 13579, p. 78). The Conclusions of Law were affirmed by this Court on appeal. *In the Matter of the Woodmar Realty Company* (1962), 307 F. 2d 591. Notwithstanding the law, the adjudication of the "allocations" includes thirteen (13) years' interest up to December 1, 1954.

(2)

The Luscher Claim (Claim No. 62) And Dead And Non-existent Lien Claimants.

As heretofore shown, respondent Davis was informed as to the fact that the Luscher claim was forged by Carl A. Huebner. Likewise, he was furnished with the death certificate of claimant David T. Emery and court orders entered twenty (20) years ago winding up the Maywood Bank receivership. He was informed further, with reference to the non-existence of at least thirty-two (32) of the abandoned claims. Yet to preserve the "symphony" of the auditing study, he successfully petitioned that these claims be benefited by "allocations".

(3)

Cancellation Decrees Protecting The City Of Hammond.

The Record discloses that foreclosure decrees in which the City of Hammond was a party defendant were entered in the state courts. The improvement bonds were ordered delivered up and cancelled and the rights of the

bondholders merged into the decrees. Examples of the foreclosure decrees, with reference to Resolutions 1296 and 1399, are set forth verbatim in Appellants' App. in 13579, pp. 114-132, incl. The foreclosure decrees expressly cancelling bonds and coupons, entered many years ago, are a vital concern to the City of Hammond and its taxpayers. Yet, the "auditing study" ignores all court proceedings and is predicated, allegedly, upon an examination of City Hall records, not participated in by the City Controller or by any official of the City of Hammond charged with the responsibility of keeping records.

(4)

Misappropriation Of Trust Assets In Violation Of Law.

The Barrett Law, which respondent trustee purports to give lip service to, provides in pertinent part:

> "If the property shall sell for more than enough to pay the principal, interest, attorney's fees, costs and expenses, **the surplus shall be paid to the property owner** or party lawfully and rightfully entitled thereto." (Burns' Indiana Statutes, 1963 Replacement, Vol. 9, Part 1, § 48-2721, p. 346)

Likewise, this Court in earlier appeals, 241 F. 2d 768 and 284 F. 2d 815, determined that the Woodmar Realty Company is entitled to the surplus. That there is a substantial cash surplus above and beyond the "allocations" is admitted in the Trustee's Supplemental Final Report; etc. If the Trustee had signed and delivered the checks in accordance with the settlement stipulations, as approved, the surplus would be greater by $76,000.00.

Notwithstanding the law and the rights of the parties, the "allocations" not only misapply the admitted surplus, but include, by formula, bonus "allocations" to many of the lien claimants:

> "If in any instance the available cash should be greater than the increased total liability, the excess would be reallocated on an overall percentage basis, and the resulting amounts would be added to the sums previously allocated from the sales of other parcels. This procedure was discussed with Mr. Murray and he expressed approval thereof.
>
> 6. In any case where the total of the bonds and coupons is less than the cash available for the payment thereof, interest on such bonds and coupons will be computed for the periods from their respective maturity dates to some current date. Interest beyond maturity will not be computed in any other cases. **If, after adding interest beyond maturity, there should still be a surplus of cash, such surplus will be reallocated on an overall percentage basis to all other rolls and series.**" (Auditing Procedure, Rec. in No. 13215, Exhibits 62, 62A and 63.)

(5)

Misinterpretation Of Section 66 Of The Bankruptcy Act.

It will be observed that the Trustee's petition and the allocation order result in the deposit of $42,148.84, subject to deduction for administrative expenses, into the Clerk's Office for disposition pursuant to Section 66 (11 USCA 106). The Trustee ignores the provision of the Act reading in pertinent part as follows:

> "* * * and at the same time the trustee shall file with the clerk a list of the names and post-office addresses, as far as known, of the persons entitled

thereto, showing the respective amounts payable to them."

Obviously, Section 66, "Unclaimed Moneys", pertains to provable creditors' claims, not liens or reclamation petitions, and involves instances where creditors of a bankrupt file proofs of claim which are allowed and after the "declaration and payment of dividends", as provided for in the preceding section, Section 65, (11 USCA 105), cannot be located. Respondents' distortion and misinterpretation of the Bankruptcy Act arises solely out of a desire to peserve the unprecedented "auditing study" method of distributing trust assets.

II.

THE ALLOWANCE OF $120,000.00 IN FEES TO APPELLEE HERSCHEL B. DAVIS AND $5,480.75 TO APPELLEE WALTER A. McLEAN, TRUSTEE, CONSTITUTES AN ABUSE OF DISCRETION, IS VIOLATIVE OF THE PROVISIONS OF THE BANKRUPTCY ACT, AND CONTRAVENES CONTROLLING PRECEDENTS ON THE SUBJECT OF COMPENSATION ALLOWABLE TO FIDUCIARIES.

A. The Bankruptcy Act Requires Notice, Evidence In Support Of The Fee Applications, And Findings Under Rule 52, All Of Which Are Absent In The Instant Case.

The notice required by Section 58(a) (8), (11 USCA 94(a)), although jurisdictional to the allowance of fees, was not given the City of Hammond.

Likewise, since the fee applications were put at issue by objections duly filed, the fee claimants had the burden of proof which they did not sustain since they offered no evidence. The Federal Rules of Civil

Procedure apply to hearings on fee applications. (See Supp. Rec. in 11783). The District Court was required to enter Findings and Conclusions of Law upon which to predicate an order. (In the interest of time, we refer to the citations heretofore set forth in this Brief under "Argument", I., E., supra.)

That notice is required, and failure to give notice will result in a denial of a fee petition, is held in the following cases:

In re. Plymouth Rubber Co. (7 Cir., 1924), 298 F. 598;
In re. Lahongrais (1 Cir., 1925), 5 F. 2d 899;
In re. Young (D.C. N.Car., 1906), 142 Fed. 891;
3 Collier, on Bankruptcy, § 62.38 (3), 1645-46 (14th ed. 1966).

That the petitioners have the burden of proof, and failure to offer evidence requires denial, is held in *In re. California Land Buyers Syndicate* (1938, D.C. Cal.), 22 F. Supp. 183.

B. The Public Has An Interest In The Allowance Of Fees In Federal Bankruptcy Proceedings.

"Allowances for counsel • • • must be moderate, not only in the interest of debtor and creditors, but in the public interest as well." *In re. Laister-Kauffmann Aircraft Corp.* (1952), 101 F. Supp. 950, p. 954. See also *London* v. *Snyder* (1947), 163 F. 2d 621:

> "Trustees in bankruptcy are public officers and officers of a court, and the officers of a court, like public officers generally 'must show clear warrant of law before compensation will be owing them for the performance of their public duties.'" *Callaghan* v. *Reconstruction Finance Corp.* (1936), 297 U.S. 464, 468; 80 L.Ed. 808.

See also *Realty Associates Securities Corp.* v. *O'Connor* (1935), 295 U.S. 295; 55 S.Ct. 663.

C. Vicarious Generosity Such As Exhibited By The Record And Order Below Will Not Be Upheld.

Justice McReynolds laid the foundation stone for this important rule in the case of *Newton, Attorney General* v. *Consolidated Gas* (1922), 259 U.S. 101; 42 S.Ct. 438. Chief Justice Taft, in the case of *In re. Gilbert* (1928), 276 U.S. 294; 48 S.Ct. 309, established the leading precedent stating:

> "We were desirous of making it clear by our action that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance."

See also:

Bailie v. *Rossell* (3rd Cir., 1932), 60 F. 2d 806;
Walton N. Moore Dry Goods Co. v. *Lawrance* (9th Cir., 1930), 38 F. 2d 186.

The law is aply summarized by the District Court in the case of *In the Matter of Barry Nao Company* (1959, D.C. Cal.), 172 F. Supp. 375, at p. 382:

> "**Extravagant** and **unwarranted** costs, **including attorneys fees,** had plagued honest and efficient administration of bankrupt estates, and came to be denounced as 'crying evils'. *Realty Associates Securities Corp.* v. *O'Connor,* 1935, 295 U.S. 295, 299, 55 S.Ct. 663, 79 L.Ed. 1446; and see: *Levin* v. *Barker,* 8 Cir., 1941, 122 F.2d 969, certiorari denied, 1942, 315 U.S. 813, 62 S.Ct. 799, 86 L.Ed. 1212; *In re Consolidated Distributors, Inc.,* 2 Cir., 1924, 298 F. 859; *In re Curtis,* 7 Cir., 1900, 100 F. 784. So the general policy had long been to **reduce all costs, including attorney's**

fees, to a reasonable minimum consistent with securing efficient administration and able legal counsel. See: 3 Collier on Bankruptcy, supra, § 62.05; 6 Remington on Bankruptcy, supra, § 2682; compare: Nadler, Fallacies In Judicial Attitudes Toward Legal Fees in Bankruptcy, 28 Journal of the National Association of Referees in Bankruptcy 10 (January 1954).

In 1935, the Supreme Court had admonished that interpretation of the bankruptcy laws **'must be adapted to [these] aims.'** *Realty Associates Securities Corp.* v. *O'Connor,* supra, 295 U.S. at pages 299-300, 55 S. Ct. at page 665.

Consistent with this admonition, 'old' General Order 42—the predecessor in function of § 62, sub. d [3 Collier on Bankruptcy, supra, § 62.38]—was construed so that no fees whatever were allowable without strict compliance, even though beneficial services had been rendered. See: *Albers v. Dickinson,* supra, 127 F.2d at pages 960-961; *In re Stratton,* supra, 51 F.2d at pages 987-988; *In re California Land Buyers Syndicate,* D.C.S.D. Cal. 1938, 22 F. Supp. 183, 186-187.

[4] Moreover, General Order 44 [11 U.S.C.A. following section 53]—which serves as 'the main "police" measure as to employment of counsel by receivers and trustees' [6 Remington on Bankruptcy, supra, § 2719] —has been similarly construed to require strict compliance, absent which all fees are denied. Cf.: *Woods* v. *City National Bank & Trust Co. of Chicago,* supra, 312 U.S. at pages 267-269, 61 S.Ct. at pages 496-497; *In re Woodruff,* supra, 121 F.2d 152; *In re Eureka Upholstering Co., Inc.,* 2 Cir., 1930, 48 F.2d 95.

To apply a different rule under § 62, sub. d would, no less surely than under General Orders 42 and 44, 'destroy the safeguards of the law and lessen the prevention of abuses.' *Weil* v. *Neary,* 1928, 278 U.S. 160, 173-174, 49 S.Ct. 144, 149, 73 L.Ed. 243." (Our emphasis)

D. The Fee Application Of Herschel B. Davis Fails To Meet The Standards Required By Section 62 (USCA Paragraph 102) And General Orders 42, 43 and 44.

The full itemization requirement of Section 62(d) of the Bankruptcy Act is now mandatory. Collier on Bankruptcy, 14th Edition, Vol. 3, Paragraph 62.05; page 1433. See also Collier's XVII, Application for Compensation, paragraph 62(d), page 1640. See also *In the Matter of National Accessories, Inc.* (D.C. Neb., 1936) 36 A.B.R., N.S. 281, 13 F. Supp. 278. An examination of the Davis itemization (Appendix in 15694 and 15695, pages 142 through 304) reveals complete inadequacy. Telephone conferences, work by a man named Gruenburg, etc. are referred to. Nowhere is shown the subject matter of consultations, benefits obtained for the trust, results achieved, etc. The petition identifies how, with whom, and where activities took place but without reference to their significance in connection with trust duties. See also *In re California Land Buyers Syndicate* (D.C. Cal., 1938) 22 F. Supp. 183.

E. Lack Of Loyal, Disinterested Service To The Trust Estate.

The record shows that appellees performed no service for the benefit of the estate, and, as volunteers, worked for the interests of a segment of City of Hammond special improvement bondholders in consummating an unprecedented "audit study" program which would inure to their benefit. The trustees were allowed compensation on February 10, 1966, for which the beneficiaries of the "allocations" will be required to pay additional attorneys fees. Such activities are not compensable under the law.

The leading case on this subject is *Woods* v. *City National Bank & Trust Co.*, 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820. This decision holds that the trustees and trustee's attorneys are held to the *highest standards of fiduciaries.* Where it appears that they *have any conflicting interests,* their claims for fees and expenses must be denied. Another leading case is *American United Mutual Life Insurance Co.* v. *City of Avon Park* (1940) 311 U.S. 138, 61 S.Ct. 157. These cases follow the earlier decisions of *Pepper* v. *Litton* (1939) 308 U.S. 295, 60 S.Ct. 238, *Jackson* v. *Smith,* 254 U.S. 586, 41 S.Ct. 200, and *Wiel* v. *Neary,* 278 U.S. 160, 49 S.Ct. 144. Although *even the presence of a conflicting interest* necessitates the denial of a claim, the language in *Pepper* v. *Litton,* supra, at page 248, seems unusually pertinent to these proceedings:

> "This alone would be a sufficient basis for the exercise by the District Court of its equitable powers in disallowing the Litton claim. But when there is added the existence of a 'planned and fraudulent scheme', as found by the District Court, the necessity of equitable relief against that fraud becomes insistent. No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered it was the duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it. Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart."

See also *Meinhardt* v. *Salmon* (1928), 249 N.Y. 458, 464, 164 N.E. 545, 546:

> "Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

CONCLUSION.

It is apparent from the Record in this case that the proceedings have been prolonged because of the failure of appellees to take reasonable steps to comply with the Bankruptcy Act and to follow legitimate directives of the District Court entered in 1941. Instead of devoting efforts to an unprecedented "auditing study" project, the public interest required that lien claims be set down for hearing and judicially determined, not by a hearsay "auditing study", but by a Referee—as ordered on November 22, 1941. The fee allowances cannot stand.

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgment below may be reversed, and for all other proper relief.

Respectfully submitted,

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